No. 14540

United States Court of Appeals

For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMICUS CURIAE

HOUGHTON, CLUCK, COUGHLIN & HENRY,
Amicus Curiae Representing Seattle Professional Engineering Employees Association (SPEEA)

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BRIEF OF AMICUS CURIAE
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We adopt the statement relating to the jurisdiction of this court, and the Counter-Statement of the Case set forth in the brief for the NLRB.

The NLRB found that Manpower Availability Conference (MAC) had its inception in an impasse in negotiations conducted for the improvement of salary rates and rate ranges (R. 131). It was on April 2, 1952, that SPEEA had notified Petitioner of the union's desire to amend the 1951 collective bargaining agreement then in effect between the parties (R. 27). A number of negotiating meetings were held thereafter, in which SPEEA sought an increase ranging from 28 to 36% of the then current wage and salary levels (R. 28). After meetings with the Federal Mediation and Conciliation Service, SPEEA reduced its request to a 13.5% increase, retroactive to July 1, 1952 (R. 29). On November 20, 1952, Petitioner stated what it termed its "ulti-

mate offer'' for a 6% increase (R. 37). This in some respects was less favorable than an offer made by Petitioner to SPEEA five months previously (R. 38).

There was in effect at the time a ''Gentlemen's Agreement'' between Boeing and about 80 manufacturers in the aircraft and related industries under which none of the other manufacturers was to consider for employment any engineer employed by Boeing without Boeing's consent (R. 90, 450-451). During the course of the negotiations mentioned, SPEEA had requested of Boeing that the Gentlemen's Agreement be terminated, and this request was refused (R. 308-309). The Gentlemen's Agreement operated as a restraint on the mobility of engineers (R. 91).

Essentially, the MAC was planned by SPEEA as a free market-place in Seattle to which all interested employers would be invited to interview any SPEEA member interested (R. 131-132). Its purpose and probable effects on Boeing will be referred to hereinafter.

SPEEA did not take any steps to induce Boeing employees to leave their employment; each individual employee was to make his own interviews, learn the terms of employment, if any, that might be offered and make his own decision (R. 44, 75, 366).

About 500 employees signified their willingness to attend the MAC out of 3,500 engineers employed at Boeing, and of these only 96 expressed the desire to secure other employment (R. 35-36). Only 18 manufacturers acknowledged SPEEA's invitation and only part of these said that they would attend; the project was given up for that reason (R. 53).

The MAC was to be conducted off of Boeing premises. No Boeing employee was to devote efforts to MAC on company time (R. 480, 485).

Petitioner concedes that Charles Pearson was discharged by Boeing because he took steps to put the MAC into operation. Petitioner in its Reply Brief (p. 5) suggests that the MAC was not a concerted activity of SPEEA. The Trial Examiner made the most explicit findings on this matter (R. 31-37, 42-43, 49, 61-62) which were adopted by the Board (R. 131, 137). The entire record makes it too clear for argument that everything which Pearson did in connection with the MAC was done under the order and direction of the officers, and the entire membership, of SPEEA.

The index hereof has been prepared to serve as a very brief summary of the argument to follow.

1.

The Substantial Evidence Rule Applies Herein as to All of Petitioner's Arguments

We take sharp exception to the statement of Petitioner that the question presented for review is solely one of law "in that the record shows no factual issue of moment" (Opening brief, p. 5).

By stating and treating the question presented on this appeal as if it were one of law only, Petitioner seeks to escape the effect of the "substantial evidence" rule. This rule is provided for by the Act itself. It requires the application of an entirely different standard for the review of findings of the Board than would be applicable usually in the review of findings of a

court. The Act provides that the findings of the Board "shall be conclusive" if supported by any "substantial evidence." The usual, stricter standard of "preponderance" of evidence has no application.

Section 10 (e) of the Act, relating to petitions by the Board for enforcement of orders, provides that

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Section 10 (f), relating to review proceedings on petition of "a person aggrieved," provides that

> "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The following are some of the many cases decided on this point subsequent to the enactment of the Administrative Procedures Act of June 11, 1946 (5 U.S.C., Sec. 1001 *et seq.*):

John Hancock Mutual Life Ins. Co. v. NLRB (CA, D.C., 1951) 191 F.(2d) 483;

NLRB v. Carpet Linoleum & Resilient Tile Layers Union No. 419 (CA-10, 1954) 213 F. (2d) 49;

NLRB v. Cold Spring Granite Co. (CA-8, 1953) 208 F.(2d) 163;

NLRB v. Deena Artware, Inc. (CA-6, 1952) 198 F.(2d) 645, cert. denied 73 S.Ct. 644;

NLRB v. Electric City Dyeing Co. (CA-3, 1950) 178 F.(2d) 980.

In *NLRB v. Deena Artware, Inc.,* 198 F.(2d) 645, the factual question was whether the picketing of the union was such as to consist of a primary or a secondary boycott. This was held on appeal to be a question of fact, not to be disturbed if supported by substantial evidence.

In *NLRB v. Electric City Dyeing Co.,* 178 F.(2d) 980, *supra,* the question was whether defendant had discharged certain persons because of union activities. The court stated:

> "We are concerned here, as in the Condenser case, with a question of fact concerning human motives, 'namely the real reason for the discharge,' 128 F.(2d) at page 74. *If the record permits conflicting conclusions as to the real reason for the discharge, we may not disturb a permissible conclusion reached by the Board.*" (*Ibid,* p. 982; italics ours)

Most of the findings of fact made by both the Trial Examiner and the NLRB support SPEEA and where there are differences between the two sets of findings it is because the NLRB rejected certain findings and recommendations made by the Trial Examiner in favor of Boeing and made substitute findings in favor of SPEEA. The record herein taken as a whole supports SPEEA even when tested by the preponderance of the evidence, let alone substantial evidence.

All of Petitioner's argument turns largely upon a version of facts adopted by Petitioner in disregard of these findings. Thus, the first 44 of the 47 pages of Petitioner's opening brief are devoted to two arguments. The first is, that Pearson's discharge was proper because he was engaged in activities not protected by Sec-

tion 7 of the Act (pp. 20-40). This argument turns upon the question as to what the purposes and effects of the MAC were. That question is bound up with such specific factual matters as the following, all of which were taken up at the hearing before the Trial Examiner: whether SPEEA conducted the MAC for purposes of collective bargaining or for other purposes; whether SPEEA induced, or planned to induce, an exodus of engineers to leave Boeing permanently (as Petitioner claims throughout its briefs) or whether SPEEA simply afforded arrangements whereby individual engineers might meet various employers and make their own decision with respect to their continued employment after securing information as to the terms of employment available; whether the "Gentlemen's Agreement" existing between Boeing and about 80 other members of the Aircraft Industries Association operated as a restraint on the freedom of SPEEA members to secure alternate employment.

The second argument in the opening brief of Petitioner is to the effect that Pearson's discharge was proper because the activities for which he was discharged amounted to a refusal to bargain in good faith on the part of the Union (pp. 40-44). This argument also turns upon the factual questions relating to the MAC above mentioned and involves the additional, factual, question as to what the intent or state of mind of SPEEA officials was.

The third argument of Petitioner, that Pearson was properly discharged for "cause" under Section 10 (c) of the Act (pp. 44-47) turns on the other two.

2.

Petitioner Disregards the Findings of the Trial Examiner and the Board as to the Real Purposes of MAC, Which Findings Were Supported by Substantial Evidence, and Claims in the Absence of Any Evidence That Great Damage Would Result to Boeing

Petitioner argues that the MAC amounted to more than a conditional threat to leave employment if satisfactory terms were not given by the employer. Petitioner urges that the real purpose of the MAC was to induce substantial numbers of the Company's engineers to leave the Company's employ. (Opening brief, pp. 8, 33). Petitioner argues that the MAC went so far as to amount to a rejection of the bargaining principle—*i.e.,* that SPEEA was not attempting, by the use of the MAC to further bargaining in good faith (*ibid.,* p. 43). Petitioner repeats frequently the use of the word "punitive" used by SPEEA in certain publicity (R. 9, 33, 36) and goes so far as to argue:

> "The contention that important objectives of the plan were 'to obtain data concerning the "market value" of engineers' (R. 32, 477) and 'to provide a meeting place where prospective employers could be contacted on an exploratory basis' (R. 32, 477) can hardly be regarded seriously." (Reply brief, p. 4)

Petitioner coined the phrase "primary intended result" which is used throughout its briefs. This is for the purpose of developing the impression that achieving terminations of employment in large numbers was the principal purpose of the MAC.

Petitioner's argument covers the same subject-mat-

ter to which the hearing before the Trial Examiner was devoted. The Trial Examiner made explicit findings on the purposes of MAC (R. 61-62, 86-87). He stated in part:

> *"Upon the entire record, there can be no doubt that the MAC was conceived as a device reasonably calculated to assist the Union, a labor organization; its stated purposes, as set forth in Pearson's testimony and in several communications to SPEEA members and the Respondent, were clearly intended to strengthen the position of the Union in the negotiations then current. I so find. . . .* Over and above any value such activities could be expected to have as a form of assistance to particular engineers who desired more lucrative employment elsewhere, *the MAC was clearly intended to make possible a strong Union line in the current negotiations for the anticipated benefit for those engineers who made no effort to leave."* (R. 61-62; italics ours)

The principal factual argument presented by Petitioner in its briefs herein is, that the MAC amounted to substantially more than a conditional threat of resignation in case that SPEEA's terms were not met. It is significant that the Trial Examiner, after seeing and hearing all of the witnesses, found this contention to be "without merit." He dealt with this subject in the following, explicit terms:

> "(The Respondent has contended that the activities of SPEEA and Chairman Pearson of the MAC committee, at the time of his discharge, amounted to *overt acts* that went far beyond any 'threat' by employees to abandon their employment conditioned upon certain demands being met. Essentially it is argued that it was SPEEA's declaration of

its intention to hold MAC if negotiations collapsed which involved the threat, but that the *activation* of the MAC and the *issuance of the invitations for it* constituted the first overt act in the anticipated 'abandonment' of their employment by a number of the Respondent's engineers. *Without regard to my disposition, elsewhere in this report, of the Respondent's other contentions, I find this one to be without merit.* The Respondent has attempted to equate a course of conduct, directed generally to *the organization* of the MAC with its possible and foreseeable *results* in particular cases. The argument is not persuasive.) (R. 86-87; italics ours)

Petitioner duly took exceptions to the findings of the Trial Examiner, which embody essentially the same factual contentions as those repeated in its briefs herein. In its exception number 1 Petitioner stated:

> "1. Respondent excepts to the Trial Examiner's finding to the effect that the primary objective of the MAC was 'to make possible a strong Union line in the current negotiation.' Respondent does not except to any finding that the MAC at one time was intended to have such an objective, in the early stages of its development, but such finding of the Trial Examiner fails to recognize that the prime objective of the MAC, after it had passed from the stage of threat to the stage of overt actuality, was no longer to facilitate and improve the charging union's bargaining position, but rather actually to induce and cause employees represented by the charging union to leave Respondent's employ." (R. 122)

In its exception number 4, Petitioner excepted to the failure of the Trial Examiner "to find that the charging union's plan to conduct an MAC . . . involved a re-

jection of the 'mutual obligation' fixed by the statute . . . to confer in good faith . . . and . . . a refusal to bargain collectively'' (R. 123-124).

In its exception number 6, Petitioner excepted to the Trial Examiner's ''finding that the MAC as projected, involved nothing more than a conditional indication that resignations might reasonably be expected to occur in the future if the Respondent failed to meet the charging union's conditions,'' repeating the same contentions summarized by the Trial Examiner in the quotation from his findings above set forth (R. 124-125).

In its exception number 9, Respondent took issue with ''the Trial Examiner's finding that the charging union did not intend to induce its members to abandon their employment,'' referring to actions of SPEEA officials and to SPEEA publications that are mentioned in Petitioner's briefs herein.

The Board in effect overruled all these exceptions.

It first adopted those findings of the Trial Examiner which were consistent with its Decision and Order; this would include the adoption of the Trial Examiner's findings quoted above (R. 131).

The Board then states the purposes of the MAC as follows:

> ''The Manpower Availability Conference was initiated to achieve two principal objectives—for purposes of mutual aid or protection, to secure other employment for those Union members who desired to change employment, and possibly to counteract the effect of the Gentlemen's Agreement, and for purposes of collective bargaining, to

> strengthen the Union's hand in its negotiations with the Respondent." (R. 135)

After distinguishing various types of cases, including the type where there is "engaging in conduct which cast doubt on the Union good faith at the bargaining table," the Board states that the Union's "concerted activity . . . was subject to none of these disabilities" (R. 137). Rejecting Petitioner's contention regarding SPEEA's taking steps to induce or cause mass terminations, the Board stated:

> "There was here in essence only a conditional threat that some of the Respondent's employees would resign if the Respondent did not meet the Union's stated bargaining demands, conduct which the Board, with Court approval, has held to be protected concerted activity." (R. 137)

There was not only substantial evidence but also a preponderance of the evidence supporting these findings of the Trial Examiner and the Board (R. 44, 75, 266, 356, 357, 359).

Mr. Gardiner, Chairman of the SPEEA executive committee, emphasized the point, which Petitioner in absence of contrary evidence now attempts to discount, that the negotiations turned largely on the determination of what the available rates from other firms might be. The Company and SPEEA were having trouble in agreeing on what the degree of difference was (R. 266). The Company had professed the policy of facilitating a departure where an employee found that he could better his salary elsewhere and was dissatisfied for that reason (R. 356). Determining what in actual fact were the terms available elsewhere, through a market me-

chanics such as the MAC, became a matter of primary concern to SPEEA.

Actually, such an arrangement as MAC turns out to be a test of the good faith of the parties on the key issue in the negotiations: whether the salary rates at Boeing were comparable to those offered elsewhere. If they were, all but a negligible number of the engineers would stay at Boeing, especially when to accept new employment would be to undertake a change of residence. In this event, the source of dissatisfaction among Boeing engineers would be removed and the pressure would be on the Union to settle with Boeing. On the other hand, if the rates offered by others were higher and Boeing stubbornly refused to meet the scale, some engineers would leave. As American citizens they have that right.

Petitioner greatly exaggerates the effect of The MAC if successful, basing its argument upon speculative testimony of a Boeing witness given in response to a hypothetical question unsupported by fact

The only evidence on possible damage to Boeing if the MAC were held was in the form of an opinion given by Mr. Logan, Vice-President of Boeing, given in response to a hypothetical question. *The question asked presupposes facts contrary to the record.*

The question asked was:

> "Q. Assuming that a substantial number of Boeing engineers in the SPEEA unit, say 500, were to leave the employ of Boeing at the same time, or within a short period, have you an opinion as to the effect that such a development would have upon the operations of the company's Seattle Division?" R. 426)

Notice that *the fact assumed by the question was that 500 engineers would leave Boeing at the same time.* The only reason that 500 rather than some other figure was selected by counsel was, that this was the total number of engineers pledged to attend MAC. *The question assumed that every engineer who attended would leave Boeing.* In contrast, *only 96 enginers had expressed the desire to change companies,* out of the 500 pledged to attend MAC. If the question had been proper at all, it should have been based upon facts in the record.

Mr. Logan's testimony given in response to this hypothetical question is both self-serving and speculative (R. 426-427). He stated that the effects turned "on the number of engineers who left and the rate at which they left" (R. 426) which of course would be under the control of Boeing by seeing to it that its terms of employment were competitive.

The MAC was intended as an expedient less drastic than a strike; if successful any pressure resulting therefrom would have been less

It is indisputable that if SPEEA had conducted a successful strike, Boeing would have faced the risk of losing not simply a portion of the 500 engineers expected to attend the MAC but many other employees also. 3500 engineers would have been thrown out of employment. In addition, there would have been several times that number of employees in other classifications. It is common knowledge that a strike if at all protracted results in a substantial portion of employees out of work going elsewhere. The effects of plant closure on business are obviously of a most drastic kind.

The record is almost indisputable that SPEEA intended to avoid a strike because it did not want to be so drastic (R. 357-359). As an organization composed of professional men, it was much more reluctant in this respect than the average labor union.

In letters to SPEEA at the time, in which Boeing's position was stated, no argument was made that the potential damage to Boeing would outrun a strike; the argument was simply that SPEEA could not resort to such action as the MAC unless the organization was out on strike (R. 51-52).

Petitioner's argument in its briefs comes now as after-thought having no basis either in the findings or in any substantial evidence.

3.

Petitioner Distorts the Problems Posed for SPEEA by the "Gentlemen's Agreement," Which Afford Independent Justification for SPEEA's Holding the MAC

The text of the "Gentlemen's Agreement" should be noted. It is in the form of a resolution adopted by the Aircraft Industries Association about three years previously (R. 435), reading:

> "There is no middle ground that will cure this problem. Pirating must be discouraged and *to that end the following practices are condemned:*
>
> "1. Advertising for employees in cities where member companies are located elsewhere unless the member company or companies located in the particular city so agree.
>
> "2. *Offering employment to employees working for other member companies unless member com-*

pany where applicant is currently employed so agrees. This applies to offers made either directly or through subcontracting companies or employment agencies." (R. 450-451; italics ours.)

The Trial Examiner stated:

> "There can be no doubt that the 'Gentlemen's Agreement' does impair the freedom of engineers to seek employment elsewhere in the field of aircraft manufacture—at least to some extent—since an employer other than his own conceivably may anticipate, reasonably enough, that his relationship with his superiors in current employment could be impaired as a result of their awareness of his attempt to secure work elsewhere, if that attempt proved unsuccessful." (R. 91)

The Board took note that one of the purposes of the MAC was "possibly to counteract the effect of the Gentlemen's Agreement (R. 135). The word "possibly" was obviously used in the same sense that SPEEA used it in its questionnaire-ballot (R. 479), as meaning to counteract the Agreement, if possible, by recourse to MAC. The Board in a footnote stated that the question whether the MAC in fact restricted employment opportunities is immaterial because the question whether such activity is protected "does not depend on whether or not it is necessary" (R. 135). We agree, but suggest that the extent to which necessity was presented affords additional, independent, justification for the MAC.

Attempting to meet the effects of the Agreement was a purpose emphasized strongly in the questionnaire-ballot mentioned:

> "Second, 'Is it ethical?' There is nothing unethical about providing a time and place for these

two groups to get together. After all, it is Boeing policies which provide the impetus for a change, not SPEEA. *Anyway, Boeing has set the ethical standard with their Gentlemen's Agreement.* Third, *'Won't the Gentlemen's Agreement of the Aircraft Industries Association be a hindrance?' Possibly, but we have a method which might get around that for some engineers, namely, expressing willingness to AIA members to notify Boeing in advance of plans to seek employment elsewhere."*

(R. 479; italics ours)

The Vice-President of Boeing admitted on cross-examination that "It had been the policy of the Boeing Airplane Company to conform its practice to that policy as set forth in paragraph 2 of the resolution" (R. 441, 451).

Illustrative letters are in evidence wherein members of the Aircraft Industries Association had refused consideration of employment applications made by SPEEA members, in compliance with the resolution above mentioned (R. 507-511; General Counsel's Exhibits 11-16). SPEEA members had brought these letters to the attention of SPEEA officials, who in turn had requested Boeing to cease and desist from any further observance of the Gentlemen's Agreement (R. 308-309).

The "Gentlemen's Agreement" of the Aircraft Industries Association went so far as to violate the anti-trust laws

It is submitted that the restraint on the mobility of engineers in securing employment caused by the Gentlemen's Agreement constituted a clear violation of the Sherman Anti-Trust Act (15 U.S.C.A., Sec. 3, *et*

seq.). The restraint need not be "complete" or its observance "rigid" to have that effect.

It has been held that restraints upon the mobility of labor in interstate commerce violate the Sherman Act fully as much as restraints upon the mobility of commodities.

> *Anderson v. Ship Owners' Ass'n.* (1926) 71 L.Ed. 298, 272 U.S. 359.

There, the Ship Owners' Association required that its members not accept any seaman for employment unless he registered with it, received a number, and waited his turn for employment. The result was, "that seamen, well qualified and well-known, are frequently prevented from obtaining employment at once, when, but for these conditions, they would be able to do so." (71 L.Ed. at p. 301). Action was brought by a seaman against the Association to enjoin the restraint. The Supreme Court reversed a decision of the Circuit Court of Appeals and held that the complaint stated a cause of action.

Restraint upon the pursuit of professional calling was held invalid by the Supreme Court in

> *American Medical Association v. U.S.* (1943) 317 U.S. 519, 87 L.Ed. 434.

Petitioner claims that the Gentlemen's Agreement was conceived for the welfare of the Aircraft Industry. However, the claim or even the existence of benevolent motive does not sanction conduct otherwise in violation of the Sherman Act;

> *United States v. U.S. Gypsum Co.* (1950) 340 U.S. 76, 95 L.Ed. 89;

Fashion Originators' Guild of America, Inc. v. Federal Trade Commission (1941) 312 457, 85 L.Ed. 949;

Standard Sanitary Mfg. Co. v. U.S. (1912) 226 U.S. 20, 57 L.Ed. 107.

Petitioner claims that Boeing did not enforce the Gentlemen's Agreement.

If the combination is for the restraint of trade the existence of the power to restrain is sufficient in itself to render it unlawful:

U.S. v. Maryland & Virginia Milk Producers' Ass'n, et al (U.S. Dist. Ct., D.C., 1949) 90 F. Supp. 681:

> "The power to determine or fix prices from time to time involves potential danger. * * * In this case, to be sure, there is no evidence of the misuse of the power. The anti-trust laws, however, are not aimed solely against abuse of power. They are directed against the very existence of the power." (*Ibid,* p. 688).

4.

SPEEA's Conduct of the MAC Was Legally Protected as Constituting an Employment and Information Service for Its Members

The applicable language of Section 7 has been in effect since the original enactment of the National Labor Relations Act; it provides:

> "*Employees shall have the right* to self-organization, to form, join or assist labor organizations, *to bargain collectively* through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargain-*

ing or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)." (Italics ours)

It is submitted that even apart from the question as to the effect of the Gentlemen's Agreement and the pendency of bargaining negotiations, SPEEA was permitted to conduct the MAC as an employment and information service to its members, this being for the purpose of the members' "mutual aid or protection." The existence of the Gentlemen's Agreement and the pendency of the negotiations provided additional, although unnecessary, justification.

In two A.L.R. articles there is an exhaustive review of the NLRB and court decisions relating to the varied purposes for which a union or group of employees may take concerted action for purposes other than collective bargaining:

6 A.L.R.(2d) p. 416 *et seq. "Right of Collective Action by Employees as Declared in Section 7 of the National Labor Relations Act,"* esp. par. 8 *et seq., "Right to engage in concerted activities,"* pp. 433, *et seq.;*

19 A.L.R.(2d) 566, *"Spontaneous or informed activity of employees as that of 'labor organization' or as 'concerted activities' within protection of Labor Relations Act."*

The first article, above, was published in 1949, the second in 1951.

In 19 A.L.R.(2d) 566, the generalization is made, at p. 569:

> "Just as a liberal interpretation has been given to the term 'labor organization,' so also the National Labor Relations Board and the courts have given a broad interpretation to the 'concerted activities' on the part of employees which are protected by Sec. 7. Since such activities are not confined to the purpose of collective bargaining but also include activities for 'other mutual aid or protection,' it has been held that protected activities include almost everything in which the employees could be found to have a legitimate interest."

Senator Taft, as one of the framers of the NLRB Act, himself recognized that a Union might perform the functions of an employment agency. His remarks implying this are cited in a footnote, in *"In the Matter of International Longshoremen's and Warehousemen's Union, et al.,* 90 NLRB 1021, at page 1069:

> "If in a few rare instances the employer wants to use the Union as an employment agency, he may do so; there is nothing to prevent his doing so. But he cannot make a contract in advance that he will only take the men recommended by the Union."

The Board and the courts have taken for granted the legality of the Union's operating a hiring hall or employment agency:

> *Brown v. National Union of Marine Cooks and Stewards* (U.S. Dist. Ct., N.D., Calif., S.D., 1951) 104 F.Supp. 685;
>
> *NLRB v. National Maritime Union of America* (C.C.A.-2, 1949) 175 F.(2d) 686;
>
> *In the Matter of National Union of Marine Cooks and Stewards* (1940) 90 NLRB 1099;

NLRB v. Swinerton & Walberg (CCA-9, (1953) 202 F.(2d) 511; cert. denied 346 U.S. 814, 98 L.Ed. 341;

NLRB v. International Longshoremen's Union (CCA-9, 1954) 210 F.(2d) 581.

It is elementary economics that if a given employer fails to offer competitive terms of employment, his employees will utilize the union hiring hall or employment office and work elsewhere. Petitioner's argument herein that a MAC would result in terminations could as well be made of a union hiring hall.

At page 10 of its reply brief, Petitioner states that

> "Boeing is the only aircraft manufacturer in the Pacific Northwest and, unlike the situation in the Los Angeles area, a move by one of Boeing's employees to another aircraft manufacturer involves, in most instances, a change of residence."

We agree. This very circumstance renders it necessary for SPEEA to establish and maintain contacts with other aircraft manufacturers located elsewhere in the United States to assure competitive terms at Boeing. Without such a mechanics as a MAC, SPEEA members would be Boeing captives, left to accept such terms as the Company wished.

The case of *Metal Moldings Corporation* (1942) 39 NLRB 107, which might on first sight seem *contra,* is readily distinguishable. Here an employee was held to be properly discharged where he solicited fellow employees to seek employment at a competing factory in which the employee's father was a foreman. Wholly lacking was the element of concerted activity author-

ized or sponsored by a labor union, contemplated in Section 7. The Board stated:

> "The action was that of the individual employee only. Also lacking was a most important requirement, that the action to be protected must be 'for the purpose of collective bargaining or other mutual aid or protection' of the employees."

Petitioner in effect concedes that a union may operate a hiring hall or employment office, but argues that this has been and must be confined to securing jobs for the unemployed members (opening brief, p. 12). There is nothing in the record to suggest that any union hiring hall ever has been so restricted in its purpose, and no authority whatsoever is cited to support the view that it must be.

The only argument available to Petitioner on this subject would be, that SPEEA was taking steps to induce employees to leave Boeing. This is a question of fact. We have seen that both the Trial Examiner and the Board made explicit finding on this point rejecting Petitioner's contention (R. 44, 75, 137).

5.

Petitioner Would Have This Court Adopt a Vague and Subjective Standard of "Protected" Concerted Activity, Amounting to an Invalid Delegation of Legislative Authority to the NLRB

The Trial Examiner had adopted the test of "improper" or "indefensible" as measuring the limits of protected, concerted activity under Section 7. In doing so, he reflected misgivings and a consciousness that the application of such a standard in practice would amount

to a delegation of law-making power to the NLRB. He stated:

> "The disposition of the ultimate question, however, has not been easy. Fundamental considerations of statutory policy, and the place of the agency in the American constitutional scheme, are involved. *Does not the exercise of the wide discretion implied in the use of 'indefensibility' as a standard of judgment imply that the Board may be called upon in these cases, to exercise a 'legislative' function in its decisional process?* But if so, may not Congress have expressly so intended. See the House Conference Report, previously noted." (R. 82-83; italics ours).

Both the majority and the minority of the NLRB accordingly rejected the rationale recommended by the Trial Examiner, turning on the tests of "improper" or "indefensible." (R. 137, 135)

Petitioner now would have this court return to such standards, conceding at times they have been given no definite limitation (or definition) by the courts:

> "The terms 'disloyal,' 'unlawful,' 'improper,' 'indefensible' and 'illegal' are broad terms and the decisions have suggested no particular limitation to their scope." (Opening Brief, p. 26)

The constitutional point is a fundamental one, that the exercise of discretion by an administrative board such as the NLRB must be in accordance with reasonably definite standards set forth in the Act itself. Otherwise the board is given a latitude so wide for its decisional process that it in substance would be exercising legislative functions, contrary to the provisions of the

Federal constitution vesting all legislative powers in the Congress. A leading case is

Schechter v. United States (1935) 79 L.Ed. 1570, 295 U.S. 495.

Here the Industrial Recovery Act was held invalid. In substance, it delegated legislative authority to the President with respect to the approval or disapproval of industrial codes. The Act authorized the President to approve such a code if it met the standard of "fair competition" for the trade or industry concerned (79 L. Ed. at p. 1582). Notice that this standard is more definite than would be the one of "propriety" or "defensibility." In writing the opinion for the court holding the act unconstitutional, Chief Justice Hughes stated:

> "Second, the question of the delegation of legislative power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Co. v. Ryan,* 293 U.S. 388, *ante,* 446, 55 S.Ct. 241. The Constitution provides that 'all legislative powers herein granted to be vested in the Congress of the United States, which shall consist of the Senate and House of Representatives.' Art. I, Sec. 1. And the Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution' its general power. Art. I, Sec. 8, Par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. * * *
>
> "Accordingly, *we look to the statutes to see whether Congress has overstepped these limitations—whether Congress in authorizing 'codes of*

> *fair competition' is thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."* (79 L.Ed. at p. 1580; emphasis supplied.)

Petitoner suggests that Section 7 must be related to the policy statements found in Section 1 of the Act, and construed to permit only the type of activity conducive to

> "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions."

A reading of Section 1 makes it obvious that it does not purport to restrict the effect of Section 7; and the language cited is not sufficiently definite to constitute a standard to measure the Board's authority.

Neither the Court nor the Board decisions have the broad implications contended for by Petitioner

The two A.L.R. articles previously mentioned constitute a careful analysis of Board and court decisions analyzing the permissible scope of concerted activity under Section 7.

> 6 A.L.R.(2d) 416, *et seq., "Right of Collective Action by Employees as Declared in Section 7 of the National Labor Relations Act,* esp. par. 8, pp. 433, *et seq.,* "Right to engage in concerted activities."
>
> 19 A.L.R.(2d) 566, *"Spontaneous or informed activity of employees as that of 'labor organization' or as 'concerted activities' within protection of Labor Relations Act."*

These A.L.R. articles set forth many of the cases cited by Petitioner herein, and show that the cases cited do not have the broad implications contended for by Petitioner. The doctrine of the leading case of *NLRB v. Peter Cailler Kohler Co.* (C.C.A.-2, 1942) 130 F.(2d) 503, is recognized, that the Act guarantees to employees the right to engage in such concerted activities for purposes of collective bargaining, etc., as do not violate the Act itself, some other statute, or the common law. Petitioner suggests, at page 31 of its opening brief, that this case represents a theory "long since obsolete, particularly in view of the Supreme Court in the *Jefferson Standard* case." The United States Supreme Court just last year recognized the *Peter Cailler* case, citing it with approval in

> *Radio Officers Union, etc., v. NLRB,* 347 U.S. 17, 98 L.Ed. 455 (Note 39, p. 477).

NLRB v. Local Union No. 1229, I.B.E.W., 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195, Distinguished.

This case is the principal one relied upon by Petitioner. Here the union had been conducting a strike and peaceful picketing when several members embarked upon a frolic of their own, giving rise to the questions presented in the case:

> "But on August 24, 1949, a new procedure made its appearance. Without warning, *several of its technicians* launched a vitriolic attack on the quality of the company's television broadcasts. * * * The handbills *made no reference to the union, to a labor controversy or to collective bargaining."* (98 L.Ed. p. 200; italics ours.)

The court [in holding that the Board correctly

denied reinstatement to these employees] based its result on two grounds: (a) that no activity of the union was presented, and (b) the activity of the individuals was deliberately disassociated from collective bargaining—the antithesis of the requirement of Section 7 that it be for collective bargaining to be protected.

The court stated:

> "Their attack related itself to no labor practice of the company.
>
> * * *
>
> "In contrast to their claims on the picket line as to the labor controversy, their handbill of August 24 omitted all reference to it. The handbill diverted attention from the labor controversy." (*Ibid.*, 98 L.Ed., p. 204)

The Board had found that the attack of the technicians was separate from the labor controversy (98 L.Ed., p. 205).

Comparable facts would be presented herein if several Boeing engineers had circulated a libelous handbill attacking the quality of Boeing airplanes, doing so in such a manner as deliberately to divert attention from the SPEEA-Boeing controversy.

What the court really was concerned with was whether the Board had correctly concluded that the employer had discharged the technicians "for cause" independent of the labor controversy so as not to be liable for reinstatement under Section 10(c) of the Act. Having found that the handbill was unrelated to the labor controversy, the court refers to such factors

as "disloyalty" and "indefensible" to show what the independent reasons for discharge were that the employer had (*Ibid.,* 98 L.Ed., pp. 204-205). Thus the court stated:

> "The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge." (98 L.Ed., p. 204)

The court, in deciding that the technicians had been discharged for "a separable cause," not because of concerted activities, simply applied the plain langauge of Section 10(c) to affirm denial of reinstatement. Conversely, if confronted with findings that Mr. Pearson in the instant case was discharged because of his participation in the concerted activities of SPEEA, it would affirm an order of reinstatement.

Other Court decisions cited by Petitioner distinguished

At pages 22 and following of its opening brief, Petitioner cites a number of court and Board decisions relating to the scope of protected activity under Section 7. We propose to refer briefly to every one of these. Their inapplicability becomes obvious once that their *facts* and *holdings* are examined.

At page 22, Petitioner reproduces a quotation taken out of context from the case of *Joanna Cotton Mills v. NLRB* (CCA-4, 1949) 176 F.(2d) 749. There the

circuit court had under consideration a petition to review and set aside an order of the NLRB requiring the Cotton Mills Company to reinstate a discharged employee. The facts were, that the employee "had been operating a punch board or raffling device on the company's premises and had been loitering around a woman weaver as she was engaged in her duties." The overseer directed his assistant, Mr. Lewis, to warn the employee. When Lewis spoke to the latter the employee "became very angry, used harsh and insulting language and assumed an insubordinate attitude." He followed this up by circulating a petition among the employees for the discharge of Lewis and presented it to the employer. The court held that there was no substantial evidence in the record supporting the view that the petition was circulated for the purpose of advancing some cause of the union, rather than to vent spleen on Lewis and modified the Board's order on this ground. The court stated:

> "It is clear, however, that to be protected the purpose of the concerted activities must be the mutual aid or protection of the employees; and it is equally clear that the circulation and presentation of the petition here involved was for no such purpose, but was nothing more or less than an effiort on the part of Blakely to vent his spleen upon a supervisory employee whose rebuke in the performance of duty had angered him." (*Ibid,* p. 753)

The only other court cases cited by Petitioner are the following:

> *NLRB v. Fansteel Metallurgical Corp.* (1939) 306 U.S. 240, 83 L.Ed. 627;

NLRB v. Kelco Corp. (CCA-4, 1949) 178 F. (2d) 578;

International Union, et al. v. Wisconsin Employment Relations Board, et al. (1949) 336 U.S. 245, 93 L.Ed. 651;

NLRB v. Draper Corp. (CCA-4, 1944) 145 F. (2d) 199;

NLRB v. Massen Gin & Machinery Works, Inc. (CCA-5, 1949) 173 F.(2d) 758;

NLRB v. Montgomery Ward & Co., Inc. (CCA-8, 1946) 157 F.(2d) 486;

Conn Limited v. NLRB (CCA-7, 1939) 108 F. (2d) 390;

Hoover Co. v. NLRB (CCA-6, 1951) 191 F. (2d) 380.

In *NLRB v. Fansteel Metallurgical Corp.,* 83 L.Ed. 627, the U.S. Supreme Court affirmed a decision of the Circuit Court of Appeals setting aside portions of a Board order requiring reinstatement of employees who had participated in a sit-down strike in which the union seized certain buildings. The court based its result on the ground that this action was illegal. The court stated:

> "Nor is it questioned that the seizure and retention of respondent's property were unlawful. It was a high-handed proceeding without shadow of legal right. It became the subject of denunciation by the state court under the state law, resulting in fines and jail sentences for defiance of the court's order to vacate and in a final decree for respondent as the complainant in the injunction suit." (83 L.Ed. at p. 633)

The next court decision cited by Petitioner is *NLRB*

v. Kelco Corp. (CCA-4, 1949) 178 F.(2d) 578. Here the court had before it a petition to enforce an order of the NLRB directing reinstatement of certain employees with back pay. As to the employees in question,

> "Respondent offered evidence, which the trial examiner refused to receive, to the effect that they assaulted one of respondent's workers who was a non-striker and chased him home and that they knocked down in the street another non-striker and beat him after he was down." (*Ibid,* p. 579)

The court of course remanded the case with directions to the NLRB to receive the evidence offered.

In the next cited case, *International Union v. Wisconsin Employment Relations Board* (1949) 336 U.S. 245, 93 L.Ed. 651, the case came up on writs of certiorari directed to the Supreme Court of Wisconsin to review judgments reversing lower court orders relating to the enforcement of orders of the Wisconsin Employment Relations Board. The activity involved consisted of a series of intermittent and unannounced work stoppages which had been conducted on company time. The question presented was, whether the State of Wisconsin through its board had jurisdiction to enter any order relating to termination of the work stoppages or whether jurisdiction for that purpose was preempted by the Federal Government through enactment of the National Labor Relations Act. The court held that the State of Wisconsin retained jurisdiction to enter orders on such subject-matter.

The case thus throws little light on the problem at hand, but deals with a separate question of Federal vs. State jurisdiction.

In the next case, *NLRB v. Draper Corporation* (CCA-4, 1944) 145 F.(2d) 199, the union and the employer were engaged in collective bargaining with the company. A small group of employees instituted a "wild cat" strike, which the court found to have been for *the purpose of interfering with the collective bargaining of the union.* For that reason the court held that the participants, having violated rights guaranteed by the Act were not entitled to its protcetion, stating that it did so

> "because we are of opinion that the 'wild cat' strike in which the employees were engaged and for which they were discharged was not such a concerted activity as falls within the protection of section 7 of the National Labor Relations Act, but a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees." (*Ibid,* p. 202)

Again, the court stated:

> "What we do mean to say is that minorities who engage in 'wild cat' strikes, in violation of rights established by the collective bargaining statute, can find nothing in the statute which protects them from discharge." (*Ibid,* 205)

In *NLRB v. Massen Gin & Machinery Works, Inc.* (CCA-5, 1949) 173 F.(2d) 758, the court denied a petition to enforce a Board order for reinstatement of striking employees without writing any opinion; there is neither an analysis of the law nor statement of facts therein.

In *NLRB v. Montgomery, Ward & Co., Inc.* (CCA-8,

1946) 157 F.(2d) 486, three employees in the Kansas City plant of the Company while at work refused to process orders for delivery to another plant of the Company in Chicago, where an affiliated local was then out on strike. Absent is the requirement of "concerted activity," since the three did not take their action for their union local; beyond that is the element of outright disobedience on the employer's time and premises.

In *C. G. Conn, Ltd., v. NLRB* (C.C.A.-7, 1939) 108 F.(2d) 390, the employees refused to work overtime, leaving their employment without warning at the end of their regular hours. The employees were discharged and ordered reinstated by the Board; the court denied an order of enforcement on the ground that the employees were attempting unilaterally to dictate the conditions of their employment:

> "We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. This is plainly what was sought to be done in this instance. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (*Ibid.*, p. 397)

It may be seriously questioned to what extent this holding will be followed by other courts, but the result can be justified on the theory that one of the terms of the contract of employment is the employee's obligation at common law to accord with the employer's reasonable directions while performing work for the employer. It would not sanction such restrictions upon the employees' free time as Petitioner contends for in this case.

In *Hoover Co. v. NLRB* (CCA-6, 1951) 191 F.(2d) 380, the United Electrical Workers' Local and another union were competing for NLRB certification. The former instituted a national boycott against the employer's product. It did so during the course of the certification election in violation of section 8(a)(1) of the Act. All the while the employees remained at work. The court stated:

> "In this case, since the United Electrical Workers Union was guilty of instigating a boycott for an unlawful purpose, such concerted activity was not protected by the Act." (*Ibid.*, p. 386)

Petitioner's NLRB Cases Distinguished

Several of the NLRB cases cited by Petitioner deal with interference with the terms of employment by activities conducted on the job. Thus, in *Honolulu Rapid Transit Co.*, 110 NLRB No. 244, 35 LRRM 1305 (1954), the employees refused to work week-ends during negotiations for a new contract, thereby interfering seriously with transit operations. In *Pacific Telephone Co.*, 107 NLRB No. 301, 33 LRRM 1433 (1954), the employees conducted a "hit and run" strike, executing a plan for intermittent, unannounced work stoppages by portions of the employees for the deliberate, announced, object of crippling communications. In *Textile Workers, CIO* (Personal Products Corp.) 108 NLRB No. 109, 34 LRRM 1059 (1954), there was both a refusal to work overtime and a deliberate slow-down while at work. In two other cases there was a refusal to work overtime, namely: *Valley City Furniture Co.* (1954) 110 NLRB

No. 216, 35 LRRM 1265, and *Phelps Dodge Cooper Products Co.* (1952) 101 NLRB No. 103, 31 LRRM 1072.

In two of the cases there was a complete absence of the requirement of "concerted activity," individual employees taking action, apart from authorization or participation by the union. The first is *Mt. Clemens Pottery Co.,* 46 NLRB No. 714, 11 LRRM 225 (1943) in which some of the employees refused to work overtime and also pulled a switch to stop plant production. The second is *Montgomery Ward & Co.,* 108 NLRB No. 152, 34 LRRM 1123 (1954), in which two employees, while at work made statements to customers for the purpose of discouraging their transacting business with their employer during a labor dispute.

In *Washington National Insurance Co.,* 64 NLRB 929, 17 LRRM 154 (1945), the employee discharged was an insurance salesman and sold insurance for a rival company in violation of his express agreement with his employer to devote full time to his employer's business; also, he knowingly falsified an insurance application.

Most of the Board decisions referred to are lacking in court approval and it may be questioned whether this will be given or withheld. The question is an academic one insofar as this case is concerned, however. The types of concerted activity prescribed by the Board in each instance go considerably beyond that shown by the findings made by the Board and the Trial Examiner with respect to the MAC herein.

In conclusion, the Decision and Order of the Board should be affirmed.

Respectfully submitted,

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